

JOSEPH G. O'BRIEN,)	Case No.: 2:07-cv-00986-GMN-GWF
)	
Plaintiff,)	
vs.)	ORDER
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
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UNITED STATES OF AMERICA,)	
)	
Counterclaim Plaintiff,)	
vs.)	
)	
JOSEPH G. O'BRIEN, MICHAEL V.)	
VILLAMOR, DAN K. SHAW, and JAMES R.)	
VAN WOERKOM,)	
)	
Counterclaim Defendants.)	
)	
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DAN K. SHAW,)	
)	
Counterclaim Plaintiff,)	
vs.)	
)	
UNITED STATES OF AMERICA,)	
)	
Counterclaim Defendant.)	
)	

Before the Court is Defendant/Counterclaim Plaintiff the United States of America's Motion for Default Judgment against Counterclaim Defendant Michael Villamor (ECF No. 82). Defendant Villamor did not file a response to Counterclaim

1 Plaintiff's Motion. Clerk's default was entered against him on June 23, 2009 (ECF No.
2 65).

3 Based on the following reasons, the Court GRANTS Counterclaim Plaintiff's
4 Motion for Default Judgment against Counterclaim Defendant Michael Villamor (ECF
5 No. 82).

6 **FACTS AND BACKGROUND**

7 The facts are adopted from Counterclaim Plaintiff the United States of America's
8 ("the United States") Counterclaim (ECF No. 17), the United States' Motion for Default
9 Judgment (ECF No. 82), and the United States' Concise Statement of Undisputed
10 Material Facts ("CS") (ECF No. 86). Defendant Michael Villamor, Dan Shaw and Gregg
11 Schatzman formed VSS in 1999 for the purpose of acquiring and managing casino
12 properties. (CS ¶ 8, ECF No. 86). The Second Amended Articles of Organization listed
13 Villamor, Shaw and Schatzman as member-managers and was in effect from October
14 1999 to its closing in 2004. (*Id.* at ¶ 10). On March 30, 2000 VSS closed a deal with
15 Harrah's Entertainment, Inc. to acquire the Showboat Hotel, Casino and Bowling Center
16 for \$23.5 million. (*Id.* at ¶¶ 19, 26). Subsequently the property was renamed the
17 Castaways Hotel, Casino, and Bowling Center ("Castaways"). (*Id.* at ¶ 26). VSS began
18 operating Castaways immediately after acquisition. (*Id.* at ¶ 29). At inception, Villamor
19 was president and CEO, Schatzman was COO and VanWoerkom was CFO. (*Id.* at ¶ 30).
20 Shaw held the title of Chairman. (*Id.*). Villamor's salary was over \$300,000 per year
21 during Castaways' period of operation. (*Id.* at ¶ 31). Villamor had the authority to write
22 checks on any of the four checking accounts VSS maintained at Wells Fargo Bank. (*Id.*
23 at ¶ 36). Following the closure of the VSS accounts at Wells Fargo in the Spring of
24 2003, Villamor had the authority to write checks on the US Bank accounts VSS opened
25 in April 2003. (*Id.* at ¶ 37). Villamor was identified as Licensee, Owner and President of

1 Castaways, having the authority to establish gaming credit policy, hire or terminate
2 supervisory casino personnel, supervise a shift of gaming activities, provide
3 complimentary benefits to casino customers other than food or beverage, manage one or
4 more of the following departments: accounting, food and beverage, cage, credit and
5 collections, personnel, internal audit, security, surveillance, entertainment, sales, and
6 marketing and also enter into contractual arrangements reportable under Nevada Gaming
7 Regulation 8.130. (*Id.* at ¶ 39).

8 VSS began to have financial trouble after September 11, 2001, due to the lack of
9 tourism. (*Id.* at ¶ 41). In the middle of 2002, VSS was unable to timely pay all of its
10 operating expenses and financial obligations, including paying the payroll tax
11 withholding to the federal government. (*Id.* at ¶ 43). VSS became delinquent in turning
12 over its federal employment tax withholdings starting in the third quarter of 2002 (July 1,
13 2002 through September 30, 2002). (*Id.* at ¶ 45). VSS filed Form 941 (Employer's
14 Quarterly Federal Tax Return) for the third and fourth quarters of 2002 and the first and
15 second quarters of 2003. (*Id.* at ¶ 56). A Form 941 is used to calculate and report what an
16 employer's net tax liability is to the government. *See e.g. Ex. 73*. The returns for the third
17 and fourth quarters of 2002 and the first quarter of 2003 understated the liability owing
18 for these periods due to the overstating of withholdings submitted to the government. (*Id.*
19 at ¶ 56). Villamor signed the Form 941 returns for the fourth quarter of 2002 and the first
20 quarter of 2003. (*Id.* at ¶ 56). VSS's delinquency in turning over the employment taxes
21 was discussed during the weekly executive meetings, attended by Villamor, from August
22 2002 through closing. (*Id.* at ¶ 32; *Villamor Depo. pp.* 139-140, 144-45; *VanWoerkom*
23 *Depo. p.* 104; *O'Brien Depo. pp.* 110-111). Despite the financial hardships faced by
24 VSS during this time, in April 2003, VSS had total deposits and credits of over
25 \$7,480,000 in its Wells Fargo account. (*Id.* at ¶ 50). Villamor was a signatory on this

1 account, and the amount of money deposited during this single month was more than
2 enough to fully pay VSS's delinquent employment tax liabilities for the third and fourth
3 quarters of 2002 and the first quarter of 2003. (*Id.* at ¶¶ 36, 66). On June 27, 2003,
4 Castaways filed for bankruptcy. (*Id.* at ¶ 64).

5 On April 3, 2006, the IRS made assessments against Villamor for Civil Penalties
6 arising from the non-payment of employment taxes by VSS in the following amount:

7 Civil Penalty, 26 U.S.C. § 6672 for 3Q 2002 04/03/2006 \$411,644.74

8 Civil Penalty, 26 U.S.C. § 6672 for 4Q 2002 04/03/2006 \$880,783.58

9 Civil Penalty, 26 U.S.C. § 6672 for 1Q 2003 04/03/2006 \$732,232.93

10 Civil Penalty, 26 U.S.C. § 6672 for 2Q 2003 04/03/2006 \$825,954.66

11 (*Id.* at ¶ 66). The total balance for these assessments, including accrued but unassessed
12 penalties and interest as of April 20, 2010 is \$3,653,085.30, plus subsequently accruing
13 interest and penalties. (*Id.* at ¶ 67).

14 The instant suit was filed by Plaintiff Joseph G. O'Brien against Defendant the
15 United States of America. (Complaint, ECF No. 1). The United States answered and
16 counterclaimed against the Plaintiff, as well as against Michael V. Villamor, Dan K.
17 Shaw, and James R. VanWoerkom (United States Answer and Counterclaims, ECF No.
18 17). Defendant Villamor failed to timely answer to the counterclaim (ECF No. 17) and a
19 Clerk's Entry of Default was entered against Villamor on 06/23/2009. Counterclaim
20 Plaintiff, the United States filed the instant Motion for Default Judgment against
21 Villamor on 04/30/2010.

22 **DISCUSSION**

23 Federal Rules of Civil Procedure 55(b) permits a default judgment following the
24 entry of default by the clerk under Rule 55(a). When the requested relief is anything other
25 than a sum certain or a sum that can be made certain by computation, the party must

1 apply to the court for a default judgment after entry of default. Fed. R. Civ. P. 55(b)(1)–
2 (2). The choice as to whether a default judgment should be entered is at the sole
3 discretion of the trial court. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980).
4 A defendant’s default alone does not entitle a plaintiff to a court-ordered judgment. *See*
5 *Id.* Instead, the Ninth Circuit has determined that a court should look at seven
6 discretionary factors before rendering a decision on default judgment. *See Eitel v.*
7 *McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). These factors are: (1) the possibility of
8 prejudice to the plaintiff; (2) the merits of plaintiff’s substantive claim; (3) the sufficiency
9 of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a
10 dispute concerning material facts; (6) whether the default was due to excusable neglect;
11 and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring
12 decisions on the merits. *Id.*

13 Once the court clerk enters a default, the well-pleaded factual allegations of the
14 complaint are taken as true, except for those allegations relating to damages. *Televideo*
15 *Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987). The plaintiff is required to
16 prove all damages sought in the complaint, and those damages may not “differ in kind
17 from, or exceed in amount, what is demanded in the pleadings.” Fed. R. Civ. P. 54(c). If
18 sufficiently documented and detailed, damages claims may be fixed by an accounting,
19 declarations, or affidavits. *See James v. Frame*, 6 F.3d 307, 310 (5th Cir. 1993).

20 In the instant case, the United States has satisfied the procedural requirements for
21 default judgment pursuant to Fed. R. Civ. P. 55(a) & (b) and Fed. R. Civ. P. 54(c).
22 Pursuant to Fed. R. Civ. P. 55(a), the Court Clerk properly entered default against
23 Villamor. The United States is properly applying to the Court for default judgment under
24 Fed. R. Civ. P. 55(b) by providing IRS Certificates of Assessments and Payments (IRS
25 Form 4340) with respect to all tax liabilities at issue. (*See Exhibits 66-69 of Darmstadter*

1 *Declaration*). The United States argues that the Ninth Circuit has repeatedly held that IRS
2 Certificates of Assessments and Payments are “probative of evidence in and of
3 themselves and, in the absence of contrary evidence, are sufficient to establish that
4 notices and assessments were properly made.” *Hughes v. United States*, 953 F.2d, 531,
5 540 (9th Cir. 1992); *Koff v. United States*, 3 F.3d 1297, 1298 (9th Cir. 1993). In *Hughes*,
6 the Court found that Certificates of Assessments and payments qualify within the
7 exception to the hearsay evidence rule as public records under Fed. R. Evid. 803(8) and
8 are self-authenticating domestic public documents under Fed. R. Evid. 902 (1). *Hughes*,
9 953 F.2d at 539-540. Also, the Ninth Circuit and other circuits have held that official
10 computer generated IRS documents (Form 4340) are admissible as public records. *Id.* at
11 540. The Supreme Court has held that an assessment for unpaid federal taxes, when
12 properly certified, is presumptively correct evidence of a taxpayer’s liability and satisfies
13 the government’s burden of proof so that the United States may rest its case. *United*
14 *States v. Janis*, 428 U.S. 433, 440-441 (1976). The United States’ cite to *Hansen v.*
15 *United States*, for the proposition that Certificates of Assessments and Payments, in the
16 absence of evidence casting doubt on their accuracy, are sufficient to support a grant of
17 summary judgment on the facts reflected thereon. 7 F.3d 137, 138 (9th Cir. 1993). The
18 United States has provided the original Certificates of Assessments and Payments in this
19 petition for entry of default judgment. These documents establish that the subject tax
20 liabilities were assessed (Sections 6201 – 6203 of the Internal Revenue Code), that notice
21 and demand for payment of these taxes was properly made (Sections 6303(a) and 6321 of
22 the Internal Revenue Code) and that the taxpayers are presumptively liable for the unpaid
23 taxes, penalties and interest shown on those Certificates. Finally, the motion complies
24 with Fed. R. Civ. P. 54(c) in that it requests a remedy that is not different in kind from
25 that prayed for in the Complaint.

1 Having satisfied the procedural requirements, the court, in its discretion, may
2 order a default judgment against Defendant based on the *Eitel* factors, outlined below.

3 *1. The possibility of prejudice to the Plaintiff.*

4 The United States is petitioning this court for judgment on its tax claims.
5 Villamor has failed to appear and defend this suit, delaying the judicial process. Without
6 a default judgment the United States cannot have a final resolution of its tax claims, and
7 thus will suffer prejudice.

8 *2. The merits of Plaintiff's substantive claim and the sufficiency of the complaint.*

9 The *Eitel* factors of the merits of Plaintiff's substantive claim and the sufficiency
10 of the complaint both require that a plaintiff "state a claim on which the [plaintiff] may
11 recover." *Danning v. Lavine*, 572 F.2D 1386, 1388 (9th Cir. 1978).

12 The United States properly sets forth a substantive claim and complaint which
13 states a claim under which it can recover. 26 U.S.C. §§ 6321, 6322, 6331(a) specifically
14 authorizes the IRS to collect outstanding federal tax liabilities. In *Phillips v.*
15 *Commissioner*, 283 U.S. 589, 595 (1931), the Supreme Court held that "[t]he right of the
16 United States to collect its internal revenue by summary administrative proceedings has
17 long been settled." 26 U.S.C. § 7041 allows the IRS to authorize the Department of
18 Justice to institute proceedings seeking to collect or recover federal taxes. (*See Answer*
19 *and Counterclaim* ¶ 27, at pg 5, ECF No. 17). Here the United States is seeking to
20 reduce to judgment assessments made pursuant to 26 U.S.C. §6672. (*Id.* at ¶¶ 25, 33).
21 Finally, 26 U.S.C. § 7402(a) gives the district courts jurisdiction to "render such
22 judgments and decrees as may be necessary or appropriate for the enforcement of internal
23 revenue laws." (*Id.* at ¶ 28). The counterclaim sufficiently sets forth the United States'
24 statutory authority for bringing this suit, the nature of the tax assessments and monetary
25 amounts at issue, and the statutory notice requirements for properly assessing tax

1 liabilities. Accordingly the United States has sufficiently pled its claim and has shown
2 that it will succeed on that claim.

3 3. *The sum of money at stake in the action.*

4 “Under the third *Eitel* factor, the court must consider the amount of money at stake
5 in relation to the seriousness of Defendant’s conduct.” *PepsiCo, Inc. v. California*
6 *Security Cans*, 238 F.Supp.2d 1172, 1176 (C.D. Cal. 2002). The United States is seeking
7 judgment for \$3,006, 409.41 against Villamor which represents the extent of Villamor’s
8 tax liabilities for the tax period at issue. The United States is not seeking any additional
9 damages, attorney fees, declaratory or injunctive relief, but only asks of the accruing
10 interest to which it is statutorily entitled. While the amount of money at stake is large in
11 this case, the United States is only asking for judgment for the unpaid taxes and interest,
12 of which it is entitled. Therefore, this factor does not weigh against granting the United
13 States a default judgment against Villamor.

14 4. *The possibility of a dispute concerning material facts.*

15 Once the court clerk enters a default, the well-pleaded factual allegations of the
16 complaint are taken as true, except for those allegations relating to damages. *Televideo*
17 *Sys., Inc.* 826 F.2d 917–18. The United States has alleged sufficient facts against
18 Villamor, default has been entered against Villamor, and he has not filed any answer or
19 motions to dispute the facts in the United States’ counterclaim. However, the United
20 States proceeds to outline Villamor’s responsibility under 26 U.S.C. § 6672 to show that
21 there cannot be any dispute concerning the material facts.

22 Section 6672(a), in part, provides:

23 Any person required to collect, truthfully account for, and pay over any tax
24 imposed by this title who willfully fails to collect such tax, or truthfully
25 account for and pay over such tax, or willfully attempts in any manner to
evade or defeat any such tax or the payment thereof, shall, in addition to
other penalties provided by law, be liable to a penalty equal to the total
amount of the tax evaded, or not collected, or not accounted for and paid
over.

1 The recovery of a penalty under Section 6672 entails a showing that the individual both
2 was a ‘responsible person’ and acted ‘willfully’ in failing to collect or pay over the
3 withheld taxes. *See Purcell v. U.S.*, 1 F.3d 932 (9th Cir. 1993). The United States has
4 alleged sufficient facts to support Villamor to be both responsible and willful under the
5 statute.

6 There are a number of factors to consider in determining whether a party is a
7 ‘responsible person’ under Section 6672. These include the “individual’s duties as
8 outlined in the corporate bylaws, his ability to sign checks, his status as an officer or
9 director, and whether he could hire and fire employees.” *U.S. v. Jones*, 33 F.3d 1137,
10 1140 (9th Cir. 1994) (adopting the Second Circuits list of factors in *Hochstein v. U.S.*,
11 900 F.2d 543, 547 (2d Cir. 1990)). “The most critical factor was having ‘significant
12 control over the enterprise’s finances.’” *Id.* The United States has alleged in the
13 complaint against Villamor that he was the President of Castaways and a member-
14 manager of VSS with a 25% ownership share. He had the authority to sign checks on
15 behalf of Castaways for both the Wells Fargo and US Bank accounts. He had the
16 authority to hire and fire employees, determine credit policy at his discretion and manage
17 shifts of gaming operations. All of the above actions show that Villamor was a
18 “responsible person” under Section 6672.

19 To satisfy the willfulness requirement under Section 6672 one must make a
20 “voluntary, conscious, and intentional act to prefer other creditors over the United
21 States.” *Davis v. United States*, 961 F.2d 867, 871 (citations omitted). “If a responsible
22 person knows that withholding taxes are delinquent, and uses corporate funds to pay
23 other expenses, even to meet the payroll out of personal funds he lends the corporation,
24 [Ninth Circuit] precedents require that the failure to pay withholding taxes be deemed
25 “‘willful.’” *Phillips v. U.S. I.R.S.*, 73 F.3d 939, 942 (9th Cir. 1996) (*citing Sorenson v.*

1 *United States*, 521 F.2d 325 (9th Cir.1975); *Teel v. United States*, 529 F.2d 903 (9th
2 Cir.1976)). The key determination in considering willfulness is the time at which the
3 responsible person first became aware that the corporation was delinquent in its payroll
4 taxes. *Davis*, 961 F.2d at 876. Villamor concedes that he learned of the nonpayment of
5 trust fund taxes at or around August, 2002. Consequently he was willful because he
6 knew that while VSS failed to remit its trust fund taxes to the federal government, other
7 creditors of VSS were being paid.

8 The United States has alleged specific facts as to Villamor's responsibility and
9 willfulness under Section 6672. There has been no dispute of these material facts on the
10 part of Villamor. As such, this factor weighs in favor of this Court granting default
11 judgment to Villamor.

12 5. *Whether the default was due to excusable neglect.*

13 Villamor was served on October 25, 2007, and his response was due on November
14 16, 2007. The Clerk's default judgment was entered against him on June 23, 2009.
15 Villamor has not appeared nor filed a response to the United States' counterclaim against
16 him. The United States filed this motion for default judgment against Villamor on April
17 20, 2010. More than four months have passed since this motion was filed and, once
18 again, Villamor has not filed a response to this motion.

19 The United States' argument that the lengthy time that has passed since Villamor's
20 responses to the complaint and motion is not due to excusable neglect is persuasive. *See*
21 *Elektra Entertainment Group, Inc. v. Crawford*, 226 F.R.D. 388, 393 (C.D. Cal. 2005).
22 The United States also offers in support of this factor that they mailed Villamor and his
23 attorney copies of the United States' Request for Entry of Default. (*See* ECF No. 55).
24 Also, the United States took Villamor's deposition in this action showing Villamor's
25 awareness of the suit but failure to respond. (*See Darmstadter Decl.*, ¶ 1, ECF No. 88).

1 6. *The strong policy underlying the Federal Rules of Civil Procedure favoring*
2 *decisions on the merits.*

3 There is a strong policy favoring a decision based on the merits; however, when
4 balanced against the other *Eitel* factors discussed above, it is obvious that this case should
5 be resolved with a court-ordered default judgment. Villamor has taken no actions to
6 defend this suit, the United States has stated a sufficient complaint and shown that it is
7 entitled to recovery under the law, and in the interest of judicial efficiency this court
8 should be compelled to grant default judgment for the United States in its action to
9 reduce federal tax assessments against Villamor to judgment.

10 In addition to the unpaid tax assessments, the United States petitions this court for
11 the interest accruing on the tax assessments. Under I.R.C. § 6601(a), statutory interest is
12 imposed on all underpayments of tax. Section 6601(e)(2) entitles the government to
13 interest on penalties and other additions to tax. The interest rate imposed on
14 underpayments of tax is determined in accordance with Section 6621(a)(2), with interest
15 compounded daily under Section 6622. The United States asserts that a Form 4340 does
16 not include all accrued interest but only interest that has been formally assessed by the
17 IRS.¹ The government has submitted the Declaration of Maria Kessner to update the
18 outstanding balances owed by Villamor on the subject tax liabilities with interest
19 calculated through April 20, 2010. (*See* Declaration of Maria Kessner ¶¶ 9-14 ECF No.
20 87). According to the United States the total owed by Villamor as of April 20, 2010 is
21 \$3,653,085.30. Given that interest on an I.R.C. § 6672 penalty is by statute necessarily
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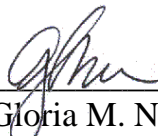
23 ¹ The relationship between the amount of interest reflected on Form 4340 and the total amount of interest owed is
24 discussed in detail in *Ghandour v. United States*, 27 Fed. Cl. 121 (Fed Cl. Ct.), *aff'd*, 132 F.3d 52 (Fed. Cir. 1997).
25 After reviewing the statutory provisions pertaining to interest on underpayments and discussing the evidentiary
significance of Form 4340, the court observed that Form 4340 includes only interest that has been assessed but does
not include accrued interest that has not been assessed. *Id.* at 125. Since the United States is entitled to all accrued
interest under Section 6601, the court ruled that it is not an evidentiary issue but a matter of law and not something
that the government must prove.

1 imposed pursuant to I.R.C. § 6601(e)(2) the United States is entitled to damages
2 representing the assessed penalty, and all interest accruing thereon from the date the
3 penalty was assessed until the date of judgment as required by law.

4 **CONCLUSION**

5 For the foregoing reasons, the Court finds that there are no genuine issues of
6 material fact regarding the amount of damages Villamor is liable to the government and
7 the United States is entitled to judgment as a matter of law. Therefore the United States'
8 Motion for Default Judgment is GRANTED against Villamor in the amount of
9 \$3,653,085.30, plus unassessed, but accrued interest, pursuant to IRC § 6601(a) until the
10 date judgment is entered.

11 DATED this 9th day of September, 2010.

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15 Gloria M. Navarro
16 United States District Judge
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